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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-59

JACK BROCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that evidence seized from his apartment should have been suppressed as the fruits of an unlawful arrest entry.

A six-count indictment returned in the United States District Court for the Southern District of Florida charged petitioner and four others with various violations of the federal narcotics laws. Specifically, petitioner was charged with conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) (Count I); possession of 525 grams of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count IV); and using a telephone to facilitate a narcotics felony, in violation of 21 U.S.C. 843(b) (Count VI). Prior to trial, petitioner moved to suppress evidence seized from his apartment following his arrest. An evidentiary hearing was conducted before a magistrate, who recommended that the suppression motion be denied.[1]

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[1]The report and recommendation of the magistrate is attached hereto as an appendix.

Subsequently, the district court granted petitioner's motion in part and severed his case.[2] Pet. App. 69-70. The government appealed the suppression ruling, and the court of appeals reversed. *Id.* at 1-45.

1. The evidence adduced at the suppression hearing showed that on November 8, 1979, co-defendant Loran Bennett obtained one kilogram of cocaine from petitioner.[3] Later that evening, he sold the cocaine to two federal narcotics agents, who then placed him under arrest. The agents seized two loaded guns from Bennett and his bodyguard, co-defendant Stanford Mitchell, and two more guns from the co-defendants' car. Bennett then told the agents that he had obtained the cocaine from petitioner at an apartment in Hialeah and that petitioner was expecting him to return to the apartment later that evening to attend a party. He gave the agents a description of petitioner and the address of his apartment and advised the agents that a woman was with petitioner. At the agents' request, Bennett called petitioner in order to arrange for another purchase of cocaine. Petitioner agreed to attempt to obtain the additional drugs. The agents conducted surveillance at the apartment and saw two men carrying small bags that looked like attache cases enter and leave it at approximately 11:30 p.m.

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[2]The evidence was suppressed only as to petitioner. Three of petitioner's co-defendants were tried together and convicted. The convictions of two of them were affirmed by the Eleventh Circuit in the same opinion in which it reversed the district court's order granting petitioner's motion to suppress. Pet. App. 1-45. A fourth co-defendant, Jorge Congote, was tried separately and was also convicted. The Fifth Circuit affirmed his conviction in a separate opinion. *United States* v. *Congote*, 656 F. 2d 971 (1981).

[3]The summary of evidence in text is taken primarily from the magistrate's report and recommendation, App., *infra*, 2a-8a. See also S. Tr. 6-12, 18-22, 28-30, 42, 163, 230, 237, 285-293, 329-330, 336-342, 366-375.

As soon as the visitors departed, the agents knocked on the front door, while another agent leaned against the nearby kitchen door. Petitioner opened the kitchen door and stuck his head and torso outside the apartment, causing the agent who had been leaning against the kitchen door to fall into the kitchen doorway. As they entered the kitchen the agents observed in plain view cocaine, paraphernalia, and a stack of cash. During a sweep search of the apartment the agents discovered co-defendant JoAnne Marszalkowski. Both she and petitioner were arrested. The agents removed a loaded revolver from the desk drawer near where they had seated Marszalkowski and seized another gun that they observed in plain view during the sweep search. At 3:00 p.m. the following day, the agents searched the premises pursuant to a warrant and seized additional evidence, including more cocaine, cash, and weapons.

2. The magistrate concluded that the arrest and ensuing seizures were lawful. He held first that no warrant was required because the entry preceded this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980). App., *infra*, 10a-13a. Alternatively, he found that petitioner's arrest was proper because it took place in the doorway after petitioner had answered the agents' knock. *Id.* at 14a. Once the arrest was made, the magistrate concluded, the agents were entitled to conduct a sweep search of the apartment. *Ibid.*

Without disturbing any of the factual findings of the magistrate, the district court applied *Payton* retroactively and held that the agents had required a warrant to arrest petitioner. Pet. App. 69-70. The court also held that the warrantless intrusion was not justified by exigent circumstances (*id.* at 70), an issue the magistrate had not discussed. It therefore suppressed all evidence seized from the apartment before the search warrant was obtained. *Ibid.* The court further held, however, that the warrant application

contained sufficient facts exclusive of the tainted evidence to establish probable cause. Hence, the district court denied petitioner's motion to suppress the evidence seized pursuant to the warrant. *Id.* at 70-71.

The court of appeals reversed, holding that none of the evidence should have been suppressed. Its decision rested on two independent grounds. First, the court held that *Payton* should not have been applied retroactively and hence no warrant was required. Pet. App. 32-40. Alternatively, the court held that exigent circumstances justified the warrantless arrest (*id.* at 42-43):

> [I]n the instant case, officers maintained surveillance of an apartment belonging to arrested co-conspirators [*sic*] Bennett's source. Having previously listened to a taped conversation between Bennett and his source, Brock, in which the latter had assured Bennett that he would obtain more drugs later that night or the next morning for another deal, the police's observation * * * of two individuals entering and leaving the apartment carrying packages gave rise to their reasonable belief of ongoing criminal activity within. Moreover, given [petitioner's] instruction that Bennett should return to the apartment that night, Bennett's failure to do so * * * would surely have aroused petitioner's suspicion. These circumstances, coupled with the relative ease with which narcotics may be disposed of, clearly meet, if not surpass, the requisite level of exigency * * *.

3. Petitioner correctly contends that the court of appeals' disposition of the retroactivity question conflicts with *United States* v. *Johnson*, No. 80-1608 (June 21, 1982).[4]

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[4]In *Johnson*, this Court applied *Payton* "retroactively to all convictions that were not yet final at the time the decision was rendered." Slip op. 24.

Despite this error in the opinion below, the arrest entry nevertheless was lawful because it was justified by the exigent circumstances exception to the warrant requirement, as the court of appeals alternatively held. See *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967). Accordingly, the outcome of this case does not depend on the retroactivity question raised by petitioner.

Whatever the merits of petitioner's claim that there were no exigent circumstances, that issue is not presently ripe for review by this Court. Petitioner has yet to be tried, and further proceedings have been stayed pending disposition of this certiorari petition. The court of appeals' decision places petitioner in precisely the position he would have occupied had the district court denied his suppression motion in the first instance; in that case, he would not have been permitted to appeal prior to trial. If petitioner is acquitted following a trial on the merits, his conviction will be moot. If, on the other hand, he is convicted, he will be able to present the exigent circumstances question to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Consequently, review by the Court at this time would be premature.[5]

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[5]In any event, the court of appeals' determination of exigent circumstances was correct and raises only a factual issue unworthy of review by this Court. The agents knew that petitioner was trying to obtain more cocaine, and they saw two men carrying attache cases enter and leave petitioner's apartment. They thus could have concluded that either a delivery or another sale had just been made.

The agents also knew that petitioner was expecting Bennett. It was reasonable to suppose that he would have become suspicious when Bennett failed to come. Accordingly, and in view of the particularly volatile nature of narcotics transactions—evidence is readily destroyable and participants generally are armed (as they were here)—immediate action was necessary. In such circumstances, the Fourth Amendment does not require a warrant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

DOJ-1982-09

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1-Cr-JWK

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

REPORT & RECOMMENDATION

LORAN A. BENNETT,
SANFORD RAYE MITCHELL,
JACK BROCK,
JOANNE ELAINE MARSZALKOWSKI,

Defendants.

Evidentiary Hearings were duly held before the undersigned on February 26, March 18, March 19 and March 20 and 28, 1980 on the respective Motions of the defendants, Jack Brock and Joanne Marszalkowski, to Suppress Statements made by them and Physical Evidence Seized, and on the respective Motions of the defendants, Loran Bennett and Sanford Raye Mitchell, to Suppress their Confessions, Admissions and Statements and to Suppress Evidence obtained through unlawful electronic surveillance of Wire and/or Oral Communication.

The following are the Findings of Fact, Conclusions of Law and Recommendation of this Court.

I. FINDINGS OF FACT

1. On November 7, 1979, Drug Enforcement Administration Agent, Charlie Brown, went with Agent Thompson to the place of business of the defendant, Loran Bennett, at

16419 N.W. 67 Avenue, Dade County, Florida, and conversed with him relative to the delivery of four kilograms of cocaine the next day. (T 6).

2. On November 8, 1979, after several phone conversations with Mr. Bennett, arrangements were made with him to meet Agents Brown and Thompson at the Ramada Inn, 7200 N.W. 11 Street, Miami, Florida.

3. At the said Ramada Inn, the Agents met Bennett and the defendant, Sanford Raye Mitchell, showed them $58,000 cash for the delivery of one kilogram of cocaine. (T 6).

4. At the time of arrest, Bennett and Mitchell, each had a loaded weapon on their person and in the vehicle utilized to deliver the kilogram of cocaine were two weapons. (T 8). Actually, the initial frisk of Mitchell did not turn up any weapon and he told the agents he had a gun (T 497, 521).

5. The defendants, Bennett and Mitchell thereupon were arrested at about 9:30 p.m., and taken to the Drug Enforcement Administration Office. (T 7).

6. Miranda rights were read to defendants Bennett and Mitchell at the time of their arrest. (T 8, 72, 127). No written waiver of rights was asked of the defendant Bennett and none was obtained (T 68).

7. Regardless as to whether Miranda Rights were actually read to Bennett and Mitchell at the moment of their arrests, Miranda rights as to the defendant, Bennett, were read to him by D.E.A. Agent Louis P. Perry from a BND 13A Miranda Warning Card (Defendant's Exhibit 2) in Agent James Peacher's vehicle in the Ramada Inn area just prior to his being transported to D.E.A. Headquarters (T 156, 279). (Defendant Bennett did not testify to the contrary).

Miranda rights as to the defendant Mitchell were read to him by D.E.A. Agent Louis P. Perry from a BND 13A Miranda Warning Card while Mitchell was placed in Agent

Perry's vehicle in the Ramada Inn area just prior to his being transported to D.E.A. headquarters (T 158). (Defendant Mitchell testified no Miranda rights were read to him. (T 500, 526).

8. This Court visited the Ramada Inn area under conditions similar to those which existed the night of November 8, 1979 and finds that there would be sufficient illumination from the interior car light for one to be able to read the Miranda warnings from a BND 13A card.

9. Defendant Mitchell stated to Agent Perry and Mr. Bennett told Agent Brown that Mitchell was just riding as a bodyguard for Mr. Bennett just to earn a few dollars (T 161, 535). Mitchell further stated that he had gone to a man's house in Hialeah; that the man and Bennett went somewhere and that a woman was sent out to talk to him (T 161) and that he remained in the kitchen. Mitchell agreed that he would cooperate. (T 162, 506).

10. Bennett was concerned about publicity affecting the election of his brother and Agent Perry stated that, "We could keep it out of the paper as far as D.E.A. is concerned until he went to the preliminary hearing . . . but D.E.A. itself would not call anybody and you know, call the press. (T 163, 237).

11. Bennett was concerned about his brother's election and his family, his wife, the house and the business. (T 234).

12. No physical violence or force was used by any of the arresting officers or those in attendance to compel or induce the defendant Mitchell to make any statements. Any bruises on the wrists of Mr. Mitchell were from the tightening of his handcuffs.

13. No physical violence or force was used by any of the arresting officers or those in attendance to compel or induce the defendant Bennett to make any statements or to cooperate with them. (T 357).

14. After his arrest and after he had been interviewed by the D.E.A. Agents, defendant Bennett made a telephone call from the D.E.A. headquarters to the person from whom he received the cocaine No. 882-9081 (T 10) and whom he designated as Jack, possibly Jack Brock. Such call was made at the request of the D.E.A. Agents at about 11:10 p.m. (T 98), and it was taped. The Agents told him what to say. (T 234).

15. Bennett gave the Agents the location of the apartment where he had secured the cocaine, 1950 W. 54 Street, Apt. 111, Hialeah, Florida (T 8) and a description of the man whose first name he said was Jack and whom he believed the full name to be Jack Brock. (T 163).

16. According to Agent Perry, the description of "Jack" was of a small man with a pot belly grey hair and a beard. (T 243-44). It was stipulated that Brock did not have a beard at the time of his arrest and that Brock was residing in the apartment. (T 491). However, the Court notes that defendant Brock with a beard was present at the Hearing and sitting in front of Agent Perry so that the description recited by Agent Perry could well have been influenced by Brock's presence. (T 243).

17. Prior to the name of Brock being given by Bennett, the Agents had never heard of Brock. (T 35, 240).

18. Two units were dispatched by the D.E.A. Agents to sit on the apartment while they were still talking to Bennett. (T 163).

19. The Agents had a "good suspicion" that Brock was at the apartment to which they were directed. (T 40).

20. While the surveillance was going on two males of average height and build were observed entering and then exiting the apartment. (T 307, 308).

21. Two men entering and two men leaving would still leave another man in the apartment who very well could have been the person who had spoken on the phone to Mr. Bennett shortly before.

22. The apartment had two doors in close proximity (T 288).

23. All but one of the agents went to the front door and Agent Walde went to the kitchen door and leaned against it (T 288-89).

24. After agents knocked on the front door, the kitchen door was opened by Mr. Brock who stuck his head and torso out of the door (T 337-38).

25. Agent Walde who was leaning against the door, fell into the kitchen.

26. The other agents immediately entered and identified themselves as Federal Agents (T 289) and moved towards Brock as he stepped back. (T 315-16). He was asked who he was. At that time, the Agents had determined who he was and he was arrested. (T 316). "He answered the description we had." (T 317).

27. No warrant for the arrest of Jack Brock had been issued.

28. At the time the agents entered the apartment, at least several of them had their guns drawn. (T 311, 335).

29. Accordingly to the agents they recognized Brock as the man who had been described by Bennett (Congote hearing, T 59).

30. The Agents had previously received information from Bennett and Mitchell that a female was the only other person in the apartment. (T 368).

31. When the agents entered the apartment Mrs. Marszalkowski was a few feet from Mr. Brock and was plainly visible to them. (T 342-43, 368).

32. After their entry of approximately two to six feet into the kitchen, the agents observed several items: a mirror with a formula for cocaine with a white powder, a cutting instrument and currency on a coffee table in the living room. (T 290, 370). The Court made a personal inspection of the kitchen and could observe the top of the coffee table upon entering into the kitchen from the outside kitchen door.

33. Despite the fact that Brock had been arrested and Mrs. Marszalkowski was being detained, the agents began what they classified as a sweep to look for other persons, although they had no information that other persons were present. (T 367-68).

34. During this protective sweep, the agents discovered several items including a gun on top of the bed, a scale and a vial of cocaine. (T 368-71).

35. When Agent Velasco returned to the living room from conducting a protective sweep, he observed under the coffee table a plastic bag containing a white powder. (T 369).

36. When Mrs. Marszalkowski was detained, she was asked to sit in a chair. (T 292).

37. After being brought to the chair by the agents, the agents opened a desk drawer located next to the chair in which they requested Mrs. Marszalkowski to sit and discovered a gun. (T 292).

38. After arresting Brock and Marszalkowski, the agents decided to procure a search warrant.

39. They secured the apartment and Agent Velasco and another agent remained to ensure that no one entered. (T 374).

40. They were relieved by Agent Preacher and another agent at approximately 8:00 a.m. in the morning, and they remained until the warrant was executed. (T 327).

41. The search warrant was executed at approximately 3:00 p.m. (T 329).

42. The following items were seized during the execution of the warrant:

A. 376 grams of cocaine in a plastic bag found under the living room table. This item was originally seen by Agent Velasco upon his re-entry into the living room after the protective sweep. (Exhibit 2 on DEA Report)

B. 157.8 grams of cocaine in a plastic bag found in the bedroom storage closet. (This item was found by Agent Velasco [Exhibit 3 on DEA Report])

C. 49.8 grams of cocaine in a container found in a living room cabinet (Exhibit 4 on DEA Report)

D. 56.2 grams of methaqualone pills in a plastic bag found in a bedroom dresser (Exhibit 5 on DEA Report)

E. 27.1 grams of cocaine in a plastic bag found in a bedroom dresser (Exhibit 6 on DEA Report)

F. 27.5 grams of cocaine in a plastic bag contained in greem [*sic*] box found in a bedroom dresser (Exhibit 7 on DEA Report)

G. 34.7 grams of cocaine in a plastic bag found in a bedroom table (Exhibit 8 on DEA Report)

H. 49.7 grams of cocaine in a plastic bag found in a bedroom table (Exhibit 9 on DEA Report)

I. 45.8 grams of cocaine in a vial found in the bathroom (Exhibit 10 on DEA Report)

J. 30.3 grams of cocaine in a vial found on the top of the bedroom dresser. This item was originally seen during the sweep by Agent Velasco (Exhibit 12 on DEA Report)

K. A greem [*sic*] box which was the original container for the 27.5 grams of cocaine referred to in Item F (Exhibit G on DEA Report)

L. $10,750.00 found in a bedroom dresser (Exhibit H on DEA Report)

M. A .357 Colt Python found in a living room desk drawer. This item was found when Mrs. Marszalkowski was asked to sit in a chair by the agents and the desk drawer was opened (Exhibit I on DEA Report)

N. An RG-14 22 caliber found in the bedroom dresser by Agent Velasco (Exhibit J on DEA Report)

O. A .38 Charter Arms found on top of the bed in the bedroom. This item was originally seen as part of the sweep (Exhibit K on DEA Report)

P. A .38 Smith and Wesson found in the bedroom night table (Exhibit L on DEA Report)

Q. Miscellaneous bullets found in the bedroom dresser by Agent Velasco (Exhibit P on DEA Report)

R. A Triple Beam Ohans Scale found in the living room which was originally seen on the sweep (Exhibit Q on DEA Report)

S. A cocaine heat tester found in the bedroom dresser (Exhibit R on DEA Report)

T. Various narcotics paraphernalia (Exhibit S on DEA Report)

43. The information which was contained in the affidavit for the search warrant was obtained through the arrests of Bennett and Mitchell and through the information supplied

by them (See Paragraph 2 and 3 of the affidavit sworn to November 9, 1979 in support of the application for a search warrant) and through the agents entry into the apartment and the subsequent sweep of the apartment. The warrant was based upon such affidavit.

II. CONCLUSIONS OF LAW

1. The statement made by the defendant, Loran Bennett, were made by him after having been duly notified of his Miranda rights. While Mr. Bennett may have been concerned about his arrest adversely affecting his brother's election and embarrassing his family, the making of statements by him and his cooperation with the Drug Enforcement Agents were voluntary acts on his part and not coerced.

2. The recording of his phone conversation with defendant Brock was done with his consent and was a consensual recording made in support of law enforcement. Similarly, the taping by D.E.A. Agents of any of his phone calls with them was lawful and proper.

3. The statements made by the defendant, Sanford Raye Mitchell, were made voluntarly after having been notified of his Miranda rights. Actually, the defendant, Mitchell, seemed anxious to convince the D.E.A. Agents that he was not involved in any sale of contraband but was merely acting as a guard for Loran Bennett.

4. The projected entry into the apartment at 1950 W. 54 Street, Apartment 111, Hialeah, Florida, was based on reasonable suspicion and probable cause to believe that the defendant Jack Brock was in the premises.

5. The D.E.A. Agents had probable cause to make the arrest of Jack Brock for having distributed cocaine to Loran Bennett.

6. The D.E.A. Agents, based upon the statements made to them by both defendants, Bennett and Mitchell, and based upon the phone call by Bennett to Brock, had good reason to believe that Jack Brock had committed a felony in having distributed a kilogram of cocaine to Bennett.

7. Upon knocking on the doors of the apartment, the door was opened by Jack Brock, who was recognized by the agents as being the person they were looking for.

The law established in the Fifth Circuit prior to the decision of the United States Supreme Court in *Payton* v. *Riddick*, Nos. 78-5420 and 78-5421, April 15, 1980, 27 Cr. L. Rep. 3033, is that a police officer may enter the home of and arrest without a warrant, one believed by him on reasonable cause to have been guilty of a felony.

> The rule is that without a warrant a police officer may arrest one believed by the officer on reasonable cause to have been guilty of a felony, *United States* v. *Watson*, 432 U.S. 411, 96 S. Ct. 820, 46 L.Ed.2d 898 (1976).
>
> This should end the matter, except that the *Watson* opinion stated that the question is still unsettled:
>
> > "[W]hether and under what circumstances (emphasis ours) an officer may enter a suspect's home to make a warrantless arrest", 423 U.S. at 418, footnote 6, 96 S. Ct. at 825.
>
> We think, however, that until the Supreme Court declares otherwise, the question is settled in the Fifth Circuit.
>
> A federal statute specifically provided's [*sic*] that agents of the Federal Bureau of Investigation may
>
> > "make arrests without warrant . . . for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the

> person to be arrested has committed such a felony", 18 U.S.C. Section 3052.

Another federal statute provides that an officer may break any outer door to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance, 18 U.S.C. Section 3107.

Although the statute facially applies only to searches pursuant to a warrant, it also applies to *warrantless* intrusions when necessitated by exigent circumstances, *United States* v. *Seelig*, 5 Cir., 1974, 498 F. 2d 109, 113. *Seelig* further held that even the required notice may be dispensed with under exigent circumstances.

Only searches and seizures are specifically mentioned in the Fourth Amendment. If we assume, but without deciding, that the Fourth Amendment applies also to arrests accomplished in the house of the person arrested, the requirements for an arrest should a *fortiori* be no more stringent than those for a search.

Relying on *Miller* v. *United States*, 357 U.S. 301, 78 S. Ct. 1190, 2 L.Ed.2d 1332 (1958), we held in *Seelig* that even the *notice* may be excused

> "if the facts known to the officers would justify them in being virtually certain that the [occupant] already knows their purpose so that an announcement would be a useless gesture", 408 F. 2d at 113.

United States v. *Williams*, 573 F. 2d 348 at 350.

The decision of the Supreme Court in *Payton* v. *Riddick*, should not be given retroactive application to pending cases. Thus the rule in *United States* v. *Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L.Ed.2d 538 (1977) has been held not to be applied retroactively.

That being the case, retroactive operation of *Chadwick* is improper. Under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), three factors are considered in determining that a decision will not be applied retroactively. Consideration is given to whether the decision establishes a new principle of law and to whether, in view of the history and purpose of the new rule, retroactive application will serve to promote or retared [*sic*] the operation of the rule. Any inequity resulting from applying the rule retroactively is also weighed. We have already expressed our opinion that the *Chadwick* decision broke new ground in applying the exclusionary rule to the kind of search at issue here. The obvious purpose in doing so was to further

> "safeguard individuals from unreasonable government invasions of legitimate privacy interests",

United States v. *Chadwick, supra*, 433 U.S. at 11, 97 S. Ct. at 2483 (Footnote omitted), by deterring police from obtaining evidence without a warrant.

That purpose, i.e., deterrence of police conduct contrary to the Fourth Amendment, would not be served in applying *Chadwick* to incidents which occurred before the decision. That retroactive application may operate to vindicate the rights of individuals, like appellant, who have been subjected to unreasonable police conduct under current standards is not dispositive. *Weinberg* v. *Mitchell*, 588 F. 2d 275 (9th Cir. 1978). Inequity on both sides of the coin must be considered. As fully explored below, the officers' conduct in this case conformed in every respect to the Fourth Amendment standards of this circuit which prevailed at the time the attache case was seized and examined. It would be inequitable to the public as well

as its law enforcement personnel to invalidate the efforts which resulted in Stewart's arrest on the basis of a constitutional principle established after the fact.

United States v. *Stewart*, 595 F. 2d 500 (9th Cir. 1979), at P. 504. As stated in *Chapman* v. *United States*, 553 F. 2d 886 at 890 (5th Cir. 1977):

> The Supreme Court's test for whether a "new Rule" in the area of criminal procedure is to be retroactively applied calls for the consideration of three criteria:
>
> > "(a) the purpose to be served by the new standards,
> >
> > (b) the extent of the reliance by law enforcement authorities on the old standards; and
> >
> > (c) the effect on the administration of justice of a retroactive application of the new standards."
>
> *Stovall* v. *Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967); *Linkletter* v. *Walker*, 381 U.S. 618, 629 85 S. Ct. 1731, 1737, 14 L.Ed.2d 601 (1965).

See also: *Linkletter* v. *Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965), refusing to apply *Mapp* v. *Ohio*, 367 U.S. 643 retroactively; *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967) limiting the right to counsel at post indictment lineup, granted in *Wade & Gilbert* to lineups which took place *after* the date of these decisions; *Desist* v. *United States*, 394 U.S. 244, 89 S. Ct. 1030 (1969) where the Court limited its decision in *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507 (1967) to warrantless electronic surveillance conducted subsequent to the *Katz* doctrine; and *Williams* v. *United States*, 401 U.S. 646, 91 S. Ct. 1148 (1971), where the Court held that its earlier decision in *Chimel* v. *California*, 395 U.S. 752, 89 S. Ct. 2034 (1969) should not be applied retroactively.

Even if we were to assume that the *Payton* v. *Riddick, supra*. Rule was to be applied retroactively, the arrest in the instant case of the defendant Brock was proper for it was Brock who opened the door in response to the knocking thereon by the D.E.A. Agents and once he was observed at the door, the arrest was proper. Once the arrest was made, the Agents had the right to enter further into the premises to secure the same against any others being there. The fact that they were told by Bennett that they could expect only Brock and Mrs. Marszalkowski, this did not exclude the possibility that others could be or would be there. As efficient and careful officers, they were to "sweep" the place for anyone else who might be there.

Once they effected the security search and they observed in plain view narcotic implements and a vial of white powder and a bag of white powdery substance, they had the right to effect the arrest of Mrs. Marszalkowski. The search of the dresser or table drawer in the immediate vincinity of Mrs. Marszalkowski was proper even though they had placed her in such vicinity. There was no sham at setting her in several different places and effecting a search at each such place.

The search pursuant to the search warrant was proper. The affidavit was based on probable cause. There was sufficient probable cause for the warrant's issuance even without any of the facts ascertained during the arrest of Brock and Marszalkowski and the security sweep thereafter. If paragraphs 4 and 5 and the first sentence of paragraph 5 of the affidavit are regarded as surplusage, there were sufficient facts alleged in the affidavit to support the search warrant. Accordingly, all of the items seized pursuant to the search warrant were properly seized and should not be suppressed. Included in these items are the specifics which the defendants Brock and Marszalkowski move to suppress. Accordingly, even if the entry was to be held to have been unwarranted and unlawful, nevertheless, the evidence seized

pursuant to a valid search warrant would have been properly seized.

III. RECOMMENDATION

It is respectfully recommended

1. That the respective Motions to Suppress submitted by the defendants be DENIED.

DATE at Miami, Florida this 4 day of JUNE, 1980.

HERBERT S. SHAPIRO
UNITED STATES MAGISTRATE

cc: Counsel of Record